

Maurer School of Law: Indiana University Digital Repository @ Maurer Law

Articles by Maurer Faculty

Faculty Scholarship

1915

Our Game of Legal Procedure

Hugh Evander Willis

Indiana University School of Law - Bloomington

Follow this and additional works at: <http://www.repository.law.indiana.edu/facpub>



Part of the [Civil Procedure Commons](#), [Criminal Procedure Commons](#), and the [Legal Profession Commons](#)

Recommended Citation

Willis, Hugh Evander, "Our Game of Legal Procedure" (1915). *Articles by Maurer Faculty*. Paper 1237.
<http://www.repository.law.indiana.edu/facpub/1237>

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.



LAW LIBRARY
INDIANA UNIVERSITY
Maurer School of Law
Bloomington

matter in the controversy, it seems to us essential to a fair trial that every fact which would throw any light upon its truth or falsity should be submitted to the jury. The state insists that the testimony with reference to defendant's confession of implication in the murder of Mr. and Mrs. Jones is too removed in point of time to be of any weight, and it must be remembered that the subject of investigation is the mental condition and peculiarities of defendant, that the motive for the confession is material, and that the peculiar mental bias, weakness or tendency may extend for a lifetime. There is often a persistency in both mental and physical habits that is remarkable, and a defective mind may continue after the childhood stage. The defendant stood charged with a crime punishable by the extreme penalty of the law. If he is a degenerate or defective, there is the more reason for care and caution that every provision which the law offers for the protection of those accused of crime should be allowed. There are numerous cases upon record where men have voluntarily confessed themselves to be guilty of atrocious crimes, where investigation has proved their innocence, and the confession could only be attributed to a defective or abnormal mentality. This is said, not as indicating or expressing any opinion as to the guilt or innocence of the defendant, but merely to emphasize the necessity of extreme care to allow the accused full opportunity to make his defense.

"After a careful consideration of all the testimony in the record, we are satisfied that without the confession there is not sufficient evidence to sustain the conviction. The most important inquiry therefore—the vital question in the case is—what weight and value should be given to the confession as evidence. To determine this, all the testimony bearing upon defendant's physical and mental condition, both at the time of the confession and before, and tendencies which he may have inherited, his manner of life, and the fact that he confessed to other homicides of which he could not have been guilty, should all be taken into consideration. We are of opinion that evidence as to any fact occurring during the life of this defendant which is in any way calculated to throw light upon the credibility of his confession is material to the issue, should have been submitted to the jury, and that it was prejudicial to his rights to exclude it."

OUR GAME OF LEGAL PROCEDURE.

Is our system of legal procedure in the United States merely a system for the administration of justice, or is it chiefly a most wonderful game? Is there anyone in this country who still thinks our legal procedure is much more than a game? If so, he needs disillusioning! Let him observe how our legal procedure fulfills all the requirements of a great game, but lacks many of the fundamental requirements for the administration of justice.

The rules of the game are classified as the rules of pleading, the rules of evidence, the rules of trial practice, and the rules of appellate practice. Our game of legal procedure originated in early English history, and has been a most popular game ever since its origination. During all the centuries that it has been played, the rules of the game have been increasing in number, until, at the present time, they are so numerous that it takes many large volumes to contain them all, and it takes a lifetime for a player or an official to learn them all. From time to time the public has assailed the game for its brutality, and as a consequence the rules of the game have been modified: this occurred in the reforms accomplished first by equity procedure and later by the code procedure; but none of the reforms have essentially changed the style of play of the old game or spoiled the game as a sport.

According to the rules of the game, the officials are one umpire, three to nine referees (varying with the jurisdiction where the game is played) and twelve linesmen. The umpire is popularly known as the trial judge. He is chosen from the ranks of captains or of coaches, and he generally has had a good deal of experience either as a captain or a coach, though this is not a necessary requirement. The umpire officiates during the second and third quarters of a game. The

referees are commonly known as the judges of the supreme court. They are chosen most frequently from the umpires, but this is not a requirement. The referees officiate only in the fourth quarter of a game. The linesmen are called the jury. They act, if at all, during the third quarter of the game. Both umpires and referees are supposed to be learned in the rules of the game, may know the players, and are allowed to know a little substantive law, but if the linesmen know anything or anybody connected with the game they are subject to disqualification by challenge.

The game is played by two teams, one known as the plaintiff's and the other as the defendant's team, or side. Each team is made up of the following players: lawyers, clients, and witnesses. The captain is always a lawyer. The captain is the conspicuous player on his side. He decides what plays shall be used, gives the signals for the other players, and does most of the playing himself. The captain may have other lawyers associated with him as sub-captains. The clients may be one or more. The witnesses may be any number. As a consequence, teams often seem to be unevenly matched. Two or three men are sometimes matched against as many as twenty or thirty. The larger team does not have the advantage that it would seem to have from its numbers, because under the rules of the game, mass plays have always been prohibited.

The rules of eligibility are simple. Anyone may be a client at any time. All that anyone has to do if he wants to play a game of legal procedure, if he is willing to play as a client, is to sue someone. He may choose anyone he likes and compel him to play with him. The result is that practically everyone gets into the game in some fashion at least once during his lifetime. The fascination of the game is such that more people would play more frequently were it not for a wise provision of the rules that if a client does

not win he must pay the costs of the suit. Were it not for this provision, most citizens would probably spend all of their time in doing nothing but playing this most exciting and alluring game. Anybody may be a witness provided he is chosen by the captain. The client has the privilege of choosing his lawyer for captain, but after he is once chosen, the captain has all the privileges. No one is eligible to be a captain, unless a client desires to be his own captain, until he has been admitted to practice. The eligibility committee, which passes upon the different applicants for admission to practice, is known as the Board of Bar Examiners. Each state in the union has a different board, and the requirements of the various boards are not uniform. These requirements relate to character, scholarship, length of preliminary study and experience, but the only requirement which has been enforced at all up to date is the scholarship requirement, and it has not been difficult to evade this up to date.

Our game of legal procedure is a professional game. The lawyers are always professionals, and the other players are professionals if the team can afford them. It would be out of the question for the position of captain to be played by amateurs. The rules of the game are so numerous and technical, the possible plays are so many and so complicated, and the ability to follow the issue requires so much skill and experience, that professionals are absolutely needed. Hence captains are always paid for playing, and are also carefully coached. The fees which the captains shall receive are regulated by themselves. Since the lawyers have a practical monopoly on the game, their charges are frequently quite exorbitant, but more frequently their charges are quite reasonable for though lawyers have a monopoly as to all other people in the community, the competition among themselves for the positions of captains has become very fierce, owing to the

overcrowding of the profession by the laxity of the boards of bar examiners. The regular coaches of the captains are the law school teachers, but a great deal of irregular coaching is done by the old lawyers who are interested in the younger players. It is the business of the coaches to train the captains in all of the tricks, schemes, positions, motions, and all other plays, both offensive and defensive, permitted by the myriad rules of pleading, evidence, and trial and appellate practice.

The game of legal procedure is played on a field called a court room, which is laid out so as to give a certain place for the umpires and referees, linesmen, witnesses, clients, and lawyers, and also with seats where the public may watch the game if it desires. Sometimes crowds throng our court rooms so that many have to be turned away, but generally the interest in the game is confined to the players and the officials.

The players do not have a ball with which to play in the game of legal procedure, but they have an intellectual substitute with which they play that in many respects resembles the material ball with which athletic teams play. This procedural ball is a thing called "the issue." It is the issue which has made it possible to develop such a game as we have in our legal procedure. Were it not for the issue, legal procedure would not be a game. All of the rules of pleading relate to the forming of the issue. The rules of evidence are for the purpose of keeping the issue between the two sides. A great captain is one who can always keep his eye on the issue, and is able to follow it through the entire game. Umpires and referees are principally concerned with deciding whether a captain has fumbled the issue, or passed the issue, or done something else with the issue. Delays and reversals and other tricks of practice are pulled off by means of the issue.

The game of legal procedure consists of four quarters. However, the rules do not require the teams to play four quarters. A game of legal procedure may end at any time. Whenever an opponent gives up and admits defeat, the game is ended. It sometimes happens that the plaintiff wins the game on the kick-off, that is after making his first pleading. However, if an opponent does not admit defeat, the game regularly proceeds through four quarters and is ended by the judgment of the referees. The captain almost always prefers to play through all four quarters, because he not only likes to play the game but is being paid for playing, but clients very frequently are satisfied with a shorter game. The first quarter is the one where the play consists of a series of pleadings. These take place off from the field and without any umpire present. The umpire decides later on, however, whether or not any of the rules of pleading have been violated by the captains. In the second quarter the play is concerned mostly with the selection of officials. Days, and sometimes weeks, are often spent in the selection of the linesmen, or jury. In the third quarter the play is concerned with the introduction of evidence and preparation for appeal. This, if any, is the spectators' quarter. If the game has not been won on the pleadings, a captain must make every effort to win it on evidence. The object of a good captain is to exclude his opponent's evidence and to get in his own, and here the work of two brilliant and evenly matched captains is liable to be most spectacular. If a captain sees that he cannot win in the third quarter, he tries to prepare his case so that he can win in the fourth quarter. This is done by getting error into the record. The fourth quarter consists of the appellate practice. The referees, looking only at the record given them of the case, decide whether or not any of the rules of the game have been

violated, and if they find that any rules have been violated, they reverse the decision of the umpire. Thus, it is seen, that one team may apparently be winning in one quarter and another team in another quarter, and one team may be ahead up to the last quarter and the other team nose out a victory in the final quarter. There are almost no penalties for rough play, or for dirty work. The only offense that is penalized is lack of respect for an umpire, or referee, which is called contempt of court, and punished by fine.

The game of legal procedure is supported by the contributions of the clients, and by the money paid by the public in the form of taxation. The clients pay the salaries of the captains. The public pays for the officials and for the maintenance of the grounds. In other words, an extravagant and duped public is paying for a game which it seldom shares or witnesses.

There is no denying the fact that the game of legal procedure is a great game. It is the greatest game on earth! No football game ever excelled it in the excitement of play. For every wonderful play upon the gridiron, there is a more wonderful play in the court room. On the football field we see beautiful tackles, trick plays, shift formations, beautifully executed forward passes, dodging runs, and perfectly executed team play. In the court room, under our system of procedure (which is unlike every other known to the world), the lawyers play a mental game of ball that has tackles, and tricks, and shift formations, and team play, which are more wonderful than any that will ever be seen upon the football fields. Our game of legal procedure is intoxicating. It thrills the lawyer who is playing it, and it generally thrills the client who is paying for it. It is a good game, but we ought not to make the mistake of calling it a system for the administration of justice. It administers justice no more than it administers injustice. It is true

we have fallen into the habit of calling it a system for the administration of justice, but let us not be deceived by the name. Have we in truth a system for the administration of justice?

Shall we permit our legal procedure to continue, the great game which it is—a game under the control of private parties—or shall we make the administration of justice one of the great duties of the state, and the receipt of justice one of the great rights of the people?

HUGH E. WILLIS.

Los Angeles, Cal.

WILLS.—ELECTION BY DEVISEE.

LINDSLEY v. PATTERSON, et al.

Supreme Court of Missouri. June 1, 1915.

177 S. W. 826.

Where a testator leaves property to a third person, and also leaves such third person's property to another, by accepting the gift from the testator to him, the third person is estopped to deny testator's devolution of his own property, and must follow the commands of the will in that respect under the doctrine of election, which is that a person accepting a gift under a will, deed, or contract must also accept the burdens imposed thereby, or must reject the gift.

Testatrix and her husband lived in Connecticut, owning property therein, and in Missouri. A Connecticut statute (Gen. St., Revision 1908, § 391) provided that a husband, upon death of his wife, might elect to take under her will, or might renounce such will and take his statutory share of the estate. Rev. St. 1909, § 350, was to the same effect in Missouri. The husband elected to take under the will in Connecticut, but thereafter filed a renunciation of such will in Missouri. Held, that such statutes, giving the husband an interest in his wife's estate, vested with him a property right at the instant of her death, and that, when she made a devise to another infringing his statutory share of the estate, if he elected to take under the will the case was proper for the application of the doctrine of election, and he could not take the increased share given him by the will in Connecticut over his statutory share there, and thereafter in Missouri repudiate his election to take under the will and receive his statutory share.

Statement of Facts.—The plaintiff brought this suit in the circuit court of the city of St. Louis, to partition three several parcels of real estate, situate therein, valued at about \$200,000. The trial resulted in a decree in favor of the